JUL 20 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 248

HAMISH SCOTT MACKAY,
Petitioner,

vs.

JOHN P. BOYD, District Director of Immigration and Naturalization, United States Department of Justice, and ROY J. NORENE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Hamish Scott MacKay, respectfully prays that a writ of certiorari issue to review the

judgment of the United States Court of Appeals for the Ninth Circuit entered on February 24, 1955.

CITATION TO OPINIONS BELOW.

The opinions of the District Court for the District of Oregon and of the Court of Appeals are unreported. They, together with the opinion and order of the Immigration and Naturalization Service, are appended hereto as Appendix I, *infra*.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 24, 1955. A petition for rehearing was timely filed and was denied on April 26, 1955. The jurisdiction of this Court is invoked under 28 USC 1254(1). The jurisdiction of the District Court to issue a writ of habeas corpus to review the deportation order was invoked under 5 USC 1009, 28 USC 2201 and 2202, and 28 USC 2241.

QUESTIONS PRESENTED.

Petitioner, a forty-six year old carpenter, lawfully entered the United States from Canada almost twenty-seven years ago. He is married to an American citizen and is the father of American born children, one of whom is presently serving in the United States Army. He has been ordered deported upon

the sole ground of his past membership in the Communist Party.

The questions presented are:

1. Whether the proof of membership is "reliable, substantial and probative" as required by the statute (8 USC 1252[b][4]); and

2. Whether there is proof of anything more than "membership . . . so nominal as to keep [petitioner] out of the deportable class" (*Galvan v. Press*, 347 U.S. 522, 527; cf. *Garcia v. Landon*, 207 F.2d 693 [CA 9], 347 U.S. 1011, 348 U.S. 866).

STATUTES INVOLVED.

8 USC Sections 1251(a)(6)(C) and 1252(b)(4), insofar as relevant here, read as follows:

> §1251(a)(6)(C): "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> ". . . aliens who are members of or affiliated with (i) the Communist Party of the United States . . ."
>
> * * * * *
>
> §1252(b)(4): ". . . no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

STATEMENT.

Despite his denial of membership in the Communist Party petitioner was ordered deported upon the testimony of four witnesses. The testimony of three of them which was offered to provide a basis for the finding of "membership" consisted only of evidence of petitioner's attendance at Communist Party meetings and of nothing more. None of these witnesses gave testimony that petitioner had ever applied for or been issued a membership book or card in the Communist Party, that petitioner had ever paid dues to the party, that petitioner had ever held any official position in it, or that petitioner had ever admitted such membership. On the contrary, when asked about such matters, these witnesses specifically disclaimed any knowledge of them.[1] Furthermore, the record does not contain reasonable, substantial and probative evidence establishing that the meetings testified to were in fact Communist Party meetings. There is enough in the record to show that the meetings spoken of were not meetings of the Communist Party but of an association of unemployed persons and persons who were on relief rolls during the 1929-33 depression.[2]

The fourth witness and the only one who gave testimony concerning alleged membership books, dues payments and the like was a woman whom petitioner had divorced for intoxication and abandonment of

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[1]Excerpts from the testimony adduced are appended thereto, Appendix II.

[2]See Appendix III.

their minor children years before and whose credibility was shown to be such as to deprive her testimony of the substantiality, reliability and probativeness which the law requires.[3]

In any case, no testimony was offered by this witness or any other which, even if stretched to the utmost, showed anything more than a membership so nominal that as a matter of law petitioner cannot be held to be a member of a deportable class. *Indeed, there was no finding that petitioner's membership was more than nominal.*

The Court of Appeals in a summary *per curiam* opinion held that there was sufficient evidence of the requisite character to sustain the finding below. By a petition for rehearing, this Court's decision in *Galvan v. Press,* 347 U.S. 522, as well as the course of the litigation in *Garcia v. Landon,* 207 F. 2d 693 (C.A. 9), 347 U.S. 1011, 348 U.S. 866, were specifically called to the attention of the Court below and the issue was sharply posed as to whether the record justified a finding of more than "nominal membership". The Court of Appeals denied the petition for rehearing without opinion and without any indication that it had passed upon this issue.

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[3]See Appendix IV.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that there was reliable, substantial and probative evidence that petitioner had been a member of the Communist Party.

2. In refusing to find that if petitioner had been a member of the Communist Party, his membership was so nominal as to exclude him from a deportable class. Indeed, the Court below failed to consider this point at all.

REASONS FOR GRANTING THE WRIT.

1. THE EVIDENCE UPON WHICH THE DEPORTATION ORDER WAS BASED WAS NOT "REASONABLE, SUBSTANTIAL AND PROBATIVE".

The Court below, almost *pro forma* and in a three sentence *per curiam* opinion, has in effect directed that petitioner, an industrious, law-abiding person who has lived in this country for almost thirty years and who has never been arrested for even so much as a traffic violation, be torn from his family and deported. It has directed that he be taken from his American-born wife and children (one of whom, at this very moment, is serving in the United States Army) and returned to a country to which he has been a stranger for almost three decades.

Clearly, while the power to deport may be "plenary", such a result can only be countenanced if there is a showing that there is good reason for committing such a person to exile. This Court has long since

recognized that deportation "may result in a loss of . . . all that makes life worth living" (*Ng Fung Ho v. White,* 259 U.S. 276, 284),[4] and undoubtedly for that reason has held that lawfully admitted resident aliens are entitled to the protections afforded to citizens by the Fifth Amendment's guarantee of due process of law. *Chew v. Colding,* 344 U.S. 590; cf. *Japanese Immigrant Cases,* 189 U.S. 86. It follows as a corollary—and the Courts have recognized it—that the judiciary may examine into the evidence offered to determine whether in fact it supports the order of deportation. *Zakonite v. Wolff,* 226 U.S. 272; cf. *Riley v. Howes,* 24 F.2d 686 (C.A. 1); and *Whitfield v. Hanges,* 222 F. 745 (C.A. 8).

In these cases the burden of proof of the issues is on the Government and not on the respondent (*United States ex rel. Karamian v. Curran,* 16 F.2d 958, 961 (C.A. 2); *Riley v. Howes,* 24 F.2d 686 (C.A. 1)) and evidence which might satisfy that burden in a civil case may well fall short of the standards required for the exercise of so extraordinary and awe-

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[4]Compare:
"Deportation is a process of . . . serious moment" (Brandeis, J., in *United States ex rel. Bilokomsky v. Tod,* 263 U.S. 149).
". . . Although deportation is not technically criminal punishment . . ., it may nevertheless visit as great a hardship as the loss of the right to pursue a vocation or calling . . ." (Douglas, J., in *Bridges v. Wixon,* 326 U.S. 135, 147).
". . . The fate of a human being is at stake" (*ibid.,* at 149).
"Here the liberty of an individual is at stake" (*ibid.,* at 154).
"Although deportation is not technically a criminal proceeding, it visits great hardship on the individual and deprives him of the right to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted" (*ibid.,* at 154).

some a power (cf. *Kwock Jan Fat v. White,* 253 U.S. 454, 464). Responsible commentators have suggested that the rule of reasonable doubt applicable in criminal cases should govern here;[5] and, indeed, in conformity with the criminal rule, the respondent in a deportation proceeding is clothed with a presumption of innocence.

> ". . . where the right to deport is based on the misconduct of the alien subsequent to his entry, the presumption of innocence obtains, and the burden is on the government to establish the fact of guilt."
>
> *Werrman v. Perkins,* 79 F.2d 467, 469 (C.A. 7).

> "It goes without saying that, under the presumption of innocence which exists in his favor and

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[5] "The argument might be made that in expulsion cases a rule of reasonable doubt should be applied similar to that which is said to be applied in criminal trials, and the warrant cancelled if such reasonable doubt exists. There is a striking similarity in fact between the purposes and results of the expulsion process and those of a criminal trial." (Van Vleck, "Administrative Control of Aliens" [1932], p. 206.)

"Whatever the constitutional powers of the government, it ought not to deprive a man of liberty and happiness *without being sure* after a thorough and impartial investigation that the alien actually falls within a proscribed class." (Chafee, "Free Speech in the United States" [1941], p. 199.)

Precedent within the Immigration Service supports the view that this rule should obtain:

"When the accused alien appears to be a person of good general character, fit for American citizenship except for the accusation at hand, and there is reasonable doubt of his membership, the warrant of arrest will be cancelled * * * In cases in which the alien is the father of children born in the United States, and therefore constitutional American citizens, and who are dependent upon and receive from him parental support, every fair doubt regarding membership within the purview of the statute will be accorded." (*In re Thomas Truss,* 66:2 H. Subcom. of Comm. on Immigration and Naturalization, Hearings on Communist and Anarchist Deportation Cases, pp. 9, 17-18.)

> the due process clause of the Constitution, the burden rests on the state or government which in some formal proceeding, criminal or otherwise, undertakes to establish the fact (of deportability)."
>
> *Hughes, Comm'r of Immigration v. Tropello,* 296 F. 306, 309 (C.A. 3).

Thus, even in a deportation case, accusation is not enough. There must be proof. And while in no deportation case has this Court spelled out the quantum of proof required,[6] the Courts of Appeals have adopted the view that the evidence must be measured by a "reasonable doubt" test or, at least, that it must be "substantial" (*Shoeps v. Carmichael,* 177 F.2d 391 [C.A. 9]; *United States v. Hughes,* 104 F.2d 14 [C.A. 3]; *Whitfield v. Hanges,* 222 F. 745 [C.A. 8]; cf. *Ex parte Plastino,* 236 F. 295 [W.D. Wash.]).[7]

The 1952 Immigration Act (8 USC 1252(b)(4)) indicates a legislative acceptance of these criteria, by

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[6]In *Bridges v. Wixon,* 326 U.S. 135, the court was considering a deportation order and concluded, *inter alia,* that it could not be sustained by evidence "too flimsy to support a finding" (at 156).

[7]In *Schneiderman v. United States,* 320 U.S. 118, it was held that in a denaturalization proceeding the Government had the burden of proving the issue by "clear, unequivocal and convincing" evidence which did not leave the issue in doubt. This standard was subsequently applied in *Baumgartner v. United States,* 322 U.S. 665, and remains the standard applicable in denaturalization cases today. Considering that deportation is followed by consequences far more serious than denaturalization, it can hardly be argued that a less rigorous standard is to be applied in a deportation case. In any event the standard to be applied must be sufficiently rigorous to justify an order of permanent exile against a human being who has broken no laws, reared an upright American family, and given his first-born son to the Army of his adopted land.

requiring that the evidence to support a deportation order be "reasonable, substantial and probative." In determining whether the evidence measures up to this statutory requirement, "the whole record" must be considered, not merely isolated portions which in and of themselves might justify the order. Cf. *Universal Camera Corporation v. National Labor Relations Board,* 340 U.S. 474, 487-488.

The charge upon which MacKay has been ordered deported is that he "became a member" of the Communist Party; not that he was sympathetic with the party or affiliated with it or had any relations with it other than those of membership. The question then is whether there was evidence of the requisite quality that MacKay was a "member" of that party. If there was not, then the Court below erred in affirming the judgment against him.

There is very little in the decided cases to assist in determining what is meant by "membership" in an organization. Clearly it imports a formal relationship with mutual rights, duties and obligations. Mere sympathy or casual connection or even "affiliation" is not sufficient.[8]

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[8]In a recent case, the court below approved a District Court's instruction to a jury that "mere association" does not constitute membership, and that,

> ". . . A person may approve some or all of the aims or activities of an organization, yet this does not make him a member. Even sympathy for the program of an organization, or contributions of money do not create the legal status of membership . . . The law also recognizes that active cooperation

The evidence of the Government's witnesses upon which the Court below relied, consists almost exclusively of testimony that in the 1930's, MacKay "attended meetings" which the witnesses, with varying degrees of clarity, called "communist" meetings. MacKay admitted attendance at most of the meetings referred to but testified that they were meetings of the Workers Alliance, an organization active on behalf of the unemployed during the early 1930's. But whether the Government's witnesses or MacKay were correct, the evidence still does not establish the fact of membership, for, as the Court below said when a similar problem was posed to it several years ago,

> "Of course, under the instructions of the court, previously mentioned, Bridges' participation in these activities, taken alone, would fall short of proof of actual Communist Party membership.
> * * *
>
> "It is true that a number of the witnesses described some of these meetings which Bridges attended, and at some of which he presided, as 'closed' Communist meetings. The logical fallacy in concluding from this that Bridges must therefore have been a Party member is that it assumes the truth of that which is sought to be proven. If, in fact, Bridges was not a Party member, his presence at such a meeting would mean no more than that he attended a meeting at

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with an organization in its activities, does not create the legal status of membership . . . Even affiliation, if you should find it to exist in this case, would not constitute the same legal status as membership, for the reason that membership refers to something more than, and different from affiliation." *Bridges v. United States*, 199 F.2d 811, 834 [CA 9].)

which every other person present was a Party member."

Bridges v. United States, 199 F. 2d 811, 836 (C.A. 9).[9]

So, here, MacKay's presence at "meetings" is not reasonable, substantial and probative evidence of "membership".

To the extent that MacKay's ex-wife gave testimony of dues payments to the Party the case stands on no better footing as a matter of law than the one decided by the Court below over twenty years ago in which a deportation order was reversed because of the insufficiency of the evidence to support it despite the fact that a witness "swore" to the critical fact. *Nagle v. Eizaguirre,* 41 F.2d 735 (C.A. 9). In that case the Court said:

> "The only testimony tending to support the charge that the appellee assisted a prostitute, as that term is understood, was the unsupported statement of the prostitute herself. Ex parte Young (D.C.) 211 F. 370. If her testimony is entitled to any credence, of course the order of the court below should be reversed, but we are inclined to agree with the court below that it is not; and this is a matter of law. She admittedly testified falsely and wittingly to material facts on the hearing; she is ignorant and illiterate, as

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[9]Compare the testimony in the case at bar:

"Q. (By Mr. Fenn [Government attorney]) Upon what do you base your knowledge that he was a member of the Communist Party?

A. On several occasions, I think about half a dozen occasions, at the closed meetings that he was present." (Tr. 445.)

her letters disclose; there is a motive back of her testimony; she is as devoid of veracity as of virtue; and has not the slightest regard for the legal or moral sanction of an oath. For these reasons, we are unwilling to sanction the deportation from the country of a man who has been engaged in a gainful occupation for many years, and whose only fault has been his unfortunate association with this degraded woman."

41 F.2d at 736.[10]

Substitute the word "Communist" for the word "prostitute" and you have the case at bar. The record shows that as a matter of law MacKay's ex-wife is not "entitled to any credence" and that she was little more than a common drunk both at the time he procured a divorce from her and obtained the custody of their minor children, and at the time she testified.[11] Certainly under those circumstances, it cannot be said that her testimony is so "reasonable, substantial and probative" as to justify a deportation order.

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[10]A similar result was reached in the earlier case of *Mouratias v. Nagle*, 24 F.2d 799 (CA 9). In that case, in addition the court took into consideration the good character of the respondent.

> "Appellant had lived in the community for fifteen years, and if credence is to be given to the practically undisputed testimony of three witnesses of apparently good standing and numerous testimonials of other witnesses, which the immigration officers received and treated as evidence, he had never before been arrested, and had borne a good reputation as an industrious and law-abiding man." (At 801.)

Attached hereto in Appendix V are summaries from the record containing some of the character testimony offered on behalf of MacKay.

[11]See excerpts from the record on this point contained in Appendix IV.

Indeed, even the ex-wife, like the other witnesses, had to concede that she was not sure of the difference between a Communist Party meeting and a Workers Alliance meeting.

"Q. And these meetings that you attended in which you claim now to be Communist Party meetings were meetings where people got together and discussed how they can get more relief and how they can keep people from being thrown out of their homes for non-payment of rent. Aren't those among the subjects that were discussed? Isn't that so?

A. (No answer.)

Q. That brings back a lot of memories, doesn't it?

A. Yes, it does.

Q. Isn't it true that most of the people discussed in these meetings at your home back in '33 and '34 and '35 was *how to get enough to eat?*

A. Yes.

Q. And *how to pay the rent?* Isn't that so?

A. Yes.

Q. And *how to keep the water from being turned off.* Isn't that so?

A. Yes.

Q. So what you claim were Communist Party meetings might have been meetings of the Workers Alliance where these problems were discussed constantly by the Oregon Workers Alliance. Isn't that true?

A. NO, I DON'T THINK SO.

Q. You never heard anybody at these meetings advocate force and violence, did you? You never heard a single person at these meetings in

your home get up and advocate force and violence. Isn't that so?

A. No, I haven't." (Tr. 770.)

A witness who "doesn't think" that a meeting is a meeting of the Workers Alliance rather than of the Communist Party can hardly be said to give testimony of such substantiality as to require this Court to decree the exile of Hamish MacKay.

It is submitted that as a matter of law the Court below was in error in holding that there was "abundant evidence" to sustain the finding. On the contrary, an examination of all of the evidence in the light of the principles heretofore discussed demonstrates that it is totally insufficient to justify sending a person of the character of Hamish MacKay into exile and tearing him from his American family after he has lived in this country blamelessly for almost three decades.

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2. SINCE THERE IS NO FINDING (NOR WOULD THE EVIDENCE SUPPORT ONE IF IT HAD BEEN MADE) THAT THERE WAS ANYTHING MORE THAN NOMINAL MEMBERSHIP, THE DEPORTATION ORDER IS INVALID.

We will assume, only for this branch of the argument, that there was evidence of the type, character and sufficiency required to support a finding that MacKay was a "member" of the Communist Party. Nonetheless, we urge that the order of deportation cannot stand.

In *Galvan v. Press,* 347 U.S. 522, this Court, in sustaining the deportation order, was very careful to

point out that, despite the literal wording of the statute which makes deportable "a member of . . . the Communist Party", there could be situations in which "membership is so nominal as to keep an alien out of the deportable class". (347 U.S. at 527.) Here was a clear warning that "mere membership", particularly in the distant past, was not sufficient to support so rigorous a penalty as deportation. Indeed, in *Galvan v. Press,* the record established far more than just "membership". According to the opinion there, there was evidence that Galvan "*had been active* (in a Communist Club), and indeed, one of its *officers.*" (347 U.S. at 527.) That is a far cry from the record presented in this case.

That the Government recognized this clear implication of *Galvan v. Press* is seen in its subsequent handling of *Garcia v. Landon,* 207 F.2d 694 (C.A. 9), certiorari granted 347 U.S. 1011, dismissed as moot *on the Government's suggestion,* 348 U.S. 866. In that case the Court below, before this Court's decision in *Galvan v. Press,* had affirmed a deportation order upon a record which showed only that the alien had been a member of the Communist Party for two years. (207 F.2d at 694, n. 3 and 4.) There was no showing in the *Garcia* case—as there is none in the case at bar—that the alien had been "active" in the Party or had been an "officer". Obviously, therefore, this Court's grant of certiorari in the *Garcia* case, just two weeks after it had affirmed—with the "nominal membership" reservation—the *Galvan* deportation or-

der, presented for review the question of whether one situated like Garcia (and also MacKay) was in the "deportable class". In other words, the sufficiency of the showing of mere membership, absent activity or officership, was about to be scrutinized by this Court.

At this juncture of the *Garcia* case—after the petition for certiorari had been granted—the Government filed in this Court a "Memorandum Suggesting that the Cause Is Moot". (No. 118 Oct. Term 1954.) This memorandum was based upon the fact that subsequent to the *Galvan* decision with its "nominal membership" reservation, the Board of Immigration Appeals had granted a *motion of the Immigration Service* to withdraw the order of deportation and to reopen the record for purposes of permitting further proceedings in the light of *Galvan v. Press.* Clearly the Government believed that a finding of mere membership would not, in the view of this Court, sustain a deportation order.

But this is precisely all the Government has here, assuming for this branch of the argument that the evidence supports any finding. For no witness—and this includes MacKay's ex-wife—testified that MacKay was "active" in the Party or an officer of it. *Indeed, the only evidence is to the contrary.* The witnesses never heard MacKay advocate force and violence and "never saw him circulate any kind of literature". (Tr. 20-21.) They disclaimed any knowledge that petitioner was an officer of the

Party,[12] or "active" in its affairs.[13] Nor is there anything in the testimony of the ex-wife which would support a finding of anything more than "mere membership". Indeed, *and this is probably the crux of the matter,* no such finding was (or could have been) made.

The deportation order entered on November 10, 1952 (Tr. 8),[14] long prior to the May 1954 decision in *Galvan v. Press,* is on its face based exclusively upon a finding of "membership" and does not even purport to be based upon any finding of "activity" or "officership". At the time the order was made the Government did not have the benefit of this Court's views in *Galvan* and made no effort to comply with the requirements of that decision.

Thus, MacKay is ordered deported on a record which this Court in *Galvan v. Press,* 347 U.S. 522, warned would not sustain such action and which the Government itself recognized in *Garcia v. Landon,* 207 F.2d 693 (C.A. 9), certiorari granted 347 U.S. 1011, dismissed as moot, 348 U.S. 866, was inadequate.

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[12]"Q. To your knowledge, did Hamish MacKay ever hold any office in the Communist Party?
A. [Witness Knipe] No, not to my knowledge." (Tr. 15.)
• • • •
"Q. Did he [MacKay] hold any office in the [Communist] Party to your knowledge?
A. [Witness Hood] Not to my knowledge." (Tr. 452.)

[13]The witnesses Knipe (Tr. 20-21) and Mahoney (Tr. 89) both spoke of petitioner's "activity"; *but only in relation to the Workers Alliance, not the Party.*

[14]This reference is to the printed record on appeal in this Court; the other references herein and in the appendices are to the typewritten transcript of the proceedings before the Immigration Service filed as part of the record herein.

The reasons which impelled this Court to grant certiorari in *Garcia v. Landon* are all present here. The question which this Court was there about to decide but which the Government voluntarily withdrew from it, is here presented again.[15]

CONCLUSION.

For the foregoing reasons the writ of certiorari should issue.

Dated, San Francisco, California,
July 15, 1955.

Respectfully submitted,
NORMAN LEONARD,
Attorney for Petitioner.

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[15]Indeed, the Government's failure to treat MacKay as it treated Garcia constitutes an unfair and arbitrary discrimination between persons similarly situated and thereby raises a serious implication of a denial of due process which commends itself to this Court's scrutiny.

(Appendices Follow.)